

FILED

OCT 13 1988

JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6571

In The
Supreme Court of the United States
October Term, 1988

DETHORN GRAHAM,
Petitioner

vs.

M. S. CONNOR, ET AL,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 7, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

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RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
7-11-85	COMPLAINT
8- 5-85	ANSWER
9-16-86	CASE CALLED FOR TRIAL BY JURY
9-19-86	ORDER
9-23-86	JUDGMENT
10-14-86	NOTICE OF APPEAL, by Pltf
12-23-87	JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

File No. C-C-85-439-P

DETHORN GRAHAM,)	
Plaintiff,)	
)	
vs.)	COMPLAINT JURY
CITY OF CHARLOTTE,)	TRIAL REQUESTED
M.S. CONNOR, R.B. TOWNES)	
T. RICE, HILDA P. MATOS,)	(Filed July 11, 1985)
and M.M. CHANDLER,)	
Defendants.)	

The Plaintiff, Dethorn Graham, alleges the following:

1. This action is brought under 42 U.S.C. Section 1983 to recover damages for the denial of Plaintiff's civil rights perpetrated by defendants under color of state law. This is also an action to recover for assault, false arrest, imprisonment, and the intentional infliction of emotional distress under the common law of North Carolina. Further, this is an action against the City of Charlotte for handicap discrimination in violation of Section 504 of the Rehabilitation Act of 1973 and N.C.G.S. 168-2.

2. Jurisdiction is conferred on this court by 28 U.S.C. Section 1343(a)(4), this being an action to secure relief under an act of Congress providing for the protection of civil rights. Jurisdiction is also conferred on this court by 28 U.S.C. Section 1331 as an action arising under

the laws of the United States. The Court has pendant jurisdiction over state law claims alleged herein.

3. Plaintiff is an adult citizen and resident of Mecklenburg County, North Carolina.

4. Defendant City of Charlotte is a municipal corporation as set out and defined in Chapter 160A of the North Carolina General Statutes.

5. At all times relevant to this action, M.S. Connor, R.B. Townes, T. Rice, Hilda P. Matos, and M.M. Chandler were employed as police officers by the City of Charlotte and were acting under color of statutes, ordinances, regulations, customs and usages of the state of North Carolina and the City of Charlotte. Upon information and belief, the said defendants are all adult citizens and residents of Mecklenburg County, North Carolina. The said defendants shall be hereafter referred to as "the officers".

6. On or about November 12, 1984, Plaintiff was travelling on West Boulevard in the City of Charlotte when the automobile in which he was riding was stopped by Officer Connor. The other officers who are defendants herein arrived at the scene shortly thereafter. When Plaintiff was stopped, Officer Connor was told that Graham was a diabetic and was suffering an insulin reaction, so that he immediately needed orange juice, candy, or some other sugar source to counteract the reaction. This request was ignored by Officer Connor. Similar explanations and requests to the other officers were similarly ignored. Further, Plaintiff asked the officers to look in his wallet for an emergency identification card which he always carries to verify his condition. The officers refused to look at this verification.

7. After Plaintiff was stopped, he was handcuffed by the officers and forced into a patrol car. No arrest was ever made. During the course of this action:

a. The officers unlawfully assaulted, imprisoned, and inflicted mental distress upon Plaintiff pursuant to ordinances, regulations, customs and usages of the State of North Carolina and City of Charlotte;

b. By show of violence and other intentional conduct, the officers placed Plaintiff in reasonable apprehension of immediate bodily harm and caused him to refrain from acts and conduct which he had a right to perform;

c. The officers placed Plaintiff in handcuffs without cause to make an arrest, thereby unlawfully restraining Plaintiff by force and threats of force;

d. The officers intentionally physically lifted Plaintiff off the ground while his hands were cuffed behind his back and shoved him face first into the hood of a patrol car with no just cause or provocation.

e. The officers ignored Plaintiff's plea for help for his insulin reaction, thereby recklessly endangering his life and health.

f. By extreme and outrageous conduct, which was intended to cause severe emotional distress, and which indicated a reckless indifference to whether such conduct would cause severe emotional distress, intentionally inflicted mental distress on Plaintiff.

8. As a direct and proximate result of defendants' conduct, Plaintiff's foot was fractured in two places, his

face and wrists were lacerated, he has suffered permanent scarring to his face and wrists, lost time away from his job recovering from his injuries, suffered extreme mental and emotional distress and humiliation, and has developed tinnitus - a permanent ringing in his ears.

8. Plaintiff's damages were a direct and proximate cause of the negligence of the City of Charlotte in that:

a. The City of Charlotte failed to train its police officers to identify and reasonably respond to medical emergencies such as the insulin reaction suffered by Plaintiff.

b. The City of Charlotte has failed to develop programs to insure that reasonable alternatives to the restraint used on Plaintiff are known and available to the police officers;

c. The City of Charlotte failed to assure that its police officers possessed proper skills and training to respond to Plaintiff without violating his civil rights or placing his life in danger or assaulting him.

d. The City of Charlotte failed to properly supervise its police officers to protect plaintiff from harm and the violation of his civil rights.

9. The defendants' actions were done wilfully, wantonly, recklessly, and in bad faith, in utter disregard for Plaintiff's safety and civil rights.

FIRST CAUSE OF ACTION

10. The defendants' actions violate Plaintiff's rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

SECOND CAUSE OF ACTION

11. The defendants unlawfully assaulted Plaintiff in violation of the common law of North Carolina.

THIRD CAUSE OF ACTION

12. The defendants' unlawful restraint of Plaintiff constituted false imprisonment in violation of the common law of North Carolina.

FOURTH CAUSE OF ACTION

13. The defendants intentionally inflicted mental and emotional distress on Plaintiff, in violation of the common law of North Carolina.

FIFTH CAUSE OF ACTION

14. The City of Charlotte is a recipient of federal financial assistance.

15. The City of Charlotte has a responsibility to train its police officers to identify and respond appropriately to medical emergencies which the officers can reasonably expect to encounter during the course of their employment.

16. The Actions of the City of Charlotte violate Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794.

SIXTH CAUSE OF ACTION

17. The actions of the City of Charlotte violate N.C.G.S. 168-2.

WHEREFORE, Plaintiff prays the following relief:

1. That judgment be entered against defendants jointly and severally for damages in the amount of \$500,000;

2. That punitive damages be assessed against the defendants in an amount to be determined by the jury.

3. That the costs of this action, including reasonable attorney fees, be taxed against the defendants;

4. That Plaintiff be awarded such additional relief as may be just and equitable.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-85-439-P

(Caption omitted in printing)

ANSWER

Jury Trial Requested

COME NOW DEFENDANTS, answering the allegations of the Complaint, and allege:

1. These allegations are denied.
2. These allegations are denied.
3. These allegations are admitted.
4. These allegations are admitted.
5. These allegations are admitted.
6. It is admitted on information and belief that plaintiff was and is diabetic. It is admitted that Officer Connor temporarily detained an automobile in which plaintiff was a passenger on or about November 12th, 1984 in Charlotte and that he did it while acting as a police officer in the performance of his duties. It is denied he or any defendant ignored any statements made to them or things seen or heard by them, or that they violated any right of the plaintiff's.
7. These allegations are denied. It is admitted that plaintiff was engaged in strange behavior which became violent and could reasonably have been foreseen to be dangerous to himself or others, and it is alleged the defendants took proper steps to prevent self-injury or

injury to others, which included efforts to immobilize him with handcuffs. It is specifically denied that any unreasonable force was used.

8. These allegations are denied.

8. (There are two paragraphs 8 in the Complaint) These allegations are denied.

9. These allegations are denied.

10. These allegations are denied.

11. These allegations are denied.

12. These allegations are denied.

13. These allegations are denied.

14. These allegations are admitted.

15. Conclusions of the plaintiff are denied.

16. These allegations are denied.

17. These allegations are denied.

FIRST FURTHER DEFENSE

1. No claim for relief is alleged by the allegations against defendant City of Charlotte for failure of the Complaint to allege any policy or pattern of city behavior which violates the rights of plaintiff under the Constitution or laws of the United States or the State of North Carolina.

SECOND FURTHER DEFENSE

1. No claim against the defendant City of Charlotte is alleged under the doctrine of pendent jurisdiction for

failure to allege agency or waiver of governmental immunity and failure to allege facts showing plaintiff to be handicapped in any manner contemplated by statute.

THIRD FURTHER DEFENSE

1. Plaintiff failed to exercise reasonable care in the self administration of medication or other medical care in connection with his diabetic condition and failed to control his own behavior thereby, and unreasonably failed to take proper steps for his own protection upon sensing that his condition might be becoming unstable, and failure to exercise ordinary reasonable care is pleaded as contributory negligence and as a bar to his claims. Plaintiff contributed thereby to his own injuries.

WHEREFORE, having fully answered the Complaint of the plaintiff, defendants pray that plaintiff recover nothing of them and that they recover their costs.

/s/ Frank B. Aycock
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CERTIFICATE

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

DeTHORN GRAHAM, WITNESS AND PLAINTIFF,
 SWORN

DIRECT EXAMINATION

BY MR. CONNETTE:

Q. Will you tell us your name and address, please?

A. DeThorne Graham, 2824 Mayfair Avenue.

Q. Are you employed, Mr. Graham?

A. Yes.

Q. Where?

A. North Carolina Department of Transportation.

Q. What do you do with the Department of Transportation?

A. I'm in maintenance and I'm a patch foreman. We repair potholes on the North Carolina roads, all over the southeast part of the county, and in doing this, I work-

Q. How long have you been doing that?

A. I've been with the department about seven or eight years.

Q. How long have you lived here in Charlotte, Mr. Graham?

A. Since '68.

Q. Calling your attention now to November 12, 1984, do you remember what you were doing in the early afternoon hours?

A. I do. I used to do mechanical work and in my days off, times off, I work on cars, and I was rebuilding an automatic transmission and I worked a little longer than I should have, and a friend of mine that we work together, Mr. Berry, he came up and I quit work, and I went and got in the car, and I told him--well, I didn't say anything. I just pointed. Well, he's familiar with me. He knows I'm a diabetic, and they have seen me go into them before, so we headed for the red light. Once at the red light, I pointed toward the airport. Well, normally when I have one, I always go to my girlfriend's house because she knows what to do for me, especially after I get so far, and then I told him--I pointed toward the store, and he pulled into the store yard. When he pulled in the store yard, he parked about as far as from here to that little seat there from the door. They have got double doors where you go in the store. They're glass doors. And I got out and went in the store.

Q. Which store was this?

A. Pilot's Service Station.

Q. What street is it on?

A. West Boulevard.

Q. When you point to the chair there, can you tell us in feet how far that distance is?

A. Probably eight, nine feet from the door.

Q. That's how far you were parked from the door of the store?

A. That's right.

Q. What did you do then?

A. When I got out of the car, I noticed a police car sitting directly in front of us. He was parked going this way, and we was parked going this way, but he was parked in the store yard anyway, but he was talking to someone, but I didn't pay that much attention to him because I had to have something for the reaction. I hurried in the store, and once I got in the store, there was five or six people up at the register, so I turned around and came back out of the store. I was in a hurry. I came back out of the store, and I got in the car and we pulled away. Nobody came out of the store behind me or anything, but we just pulled away, and he got on West Boulevard, and I pointed toward my girlfriend's house. He knew where I was going, and he knew what was wrong, and he kept asking me, "Are you all right?" And I just--(pointing)--and we started down the boulevard, and the police car came out and started following us, and he asked me, he said, "What did you do in the store?" I said, "I didn't do anything." He said, "There's a police car following us." I said, "Skip him. Just keep on to where we're going." The police car stopped us.

Q. About how far from the store had you gone before the police car stopped you?

A. Half a mile.

Q. What happened then?

A. The police car stopped us, and—but I didn't have any idea why he wanted to stop us. He came up to the car. He didn't say anything to the driver. He said, "What's wrong with your friend?" And he told him, he said, "I don't know, but I think he's having a sugar reaction," and he said, "I don't know what to do for him," and the officer said, "Well, I'm going to have to—wait here until I find out what he did in the store."

Q. What did you do at that point?

A. At that point, now, this is the last thing that I remember. I said to myself—I'm not sure whether I said it out loud or not. I said, "If he thinks I'm going to sit here in the car while I'm dying to wait for him to find out something when there really is nothing," and that's about the last thing I remember.

Q. Do you know what you did next?

A. No, I don't.

Q. What's the next thing that you remember?

A. The next thing I can remember, I was on the ground, and when I looked up, I recognized one person's face. you know, I have lived out in that area for approximately 20 years, and I know practically everybody on that side, and the first thing I can remember after that was the face of this girl. I know her name is Maggie Black. I recognized her face and the police officer, and all this, you know—that's the next thing I remember.

Q. In addition to Maggie Black, was there anyone else present?

Well, Mr. Berry and Ben was there. I think he was—he was talking to me, I think. I recognized his voice before I recognized Ms. Black, but I was on the ground at that time.

Q. Did you see any police officers?

A. I did.

Q. Where were they?

A. By my arm and all over me.

Q. Do you know how many police officers there were at that point?

A. At that point, no, I couldn't tell you, but there was more than three.

Q. And when you say that you were lying on the ground, can you tell us where you were lying on the ground in relation to the car?

A. Well, Mr. Berry's car was parked next to the street because when the officer stopped us, he was in the right-hand lane, and he just pulled over and stopped all the way up to the sidewalk almost, and when I got—next thing I can remember, I was on the sidewalk and everybody was pushing, shoving.

Q. What happened then?

A. They finally got me up off the ground, and at this point I was beginning to realize what had happened, and they had the handcuffs on.

Q. When you say the handcuffs were on, how were your hands cuffed?

A. My hands was cuffed from behind, and the cuff was real tight—really tight. They was just real tight.

Q. And you were on the ground at this point?

A. Yes.

Q. Were you lying on your back or your stomach or sitting or what?

A. Well, when I first kind of came to my senses, when they was trying to put the cuffs on, I come to my senses—I think it was when they was trying to put the cuffs on me.

Q. Were you on your back or stomach?

A. I was on my stomach.

Q. After the handcuffs were put on you, what happened then?

A. Well, they snatched me up.

Q. Who snatched you up?

A. One of the police officers. It was a couple of police officers.

Q. Do you remember how you were lifted?

A. From behind, and with one of my shoulders, I think, or with the collar of my shirt one, in the back.

Q. What happened then?

A. They walked me over to the front of Mr. Berry's car, and at this point I was coming out of it, and the cuffs was on me from behind, and I recognized then what was going on, and I knew what I had to do. I always carried a card in my wallet saying that I'm diabetic. I did that since

'63, because when I was home, everybody knew what was wrong with me, but when I was out in the street, people didn't know you and something happen to you, somebody look in your wallet, they can see, you know, that you're not drunk and all this, and they had the handcuffs on me, and my wallet is always in my back pocket on the back. The cuffs was on me behind like this. They was real tight, and I was standing like this at the hood of the car. The officers—there was one here and one here, and I think there was one behind me, and the cuffs was real tight, and I said, "My diabetic decal is in my pocket. All I have got to do is look at it." I was bending over trying to get my wallet out because my hands was cuffed. Somebody told me to shut up. I said, "Don't tell me to shut up because I'm trying to tell you what's wrong with me," and at that point somebody grabbed me from behind and slammed my head into the hood of Mr. Berry's car, and the next thing that I remember, I was face down, an officer on this arm, officer on this arm, officer on my left leg, and on my right leg, and they was carrying me to the police car, and one of them opened the door and threw me in like a bag of potatoes and closed the door.

Q. Do you recall feeling anything in particular at the point where your head was pushed into the hood of the car?

A. Well, the next thing I can remember is when I was on the way, you know, when they had me face down, but by then, you know, my head was throbbing so bad, I couldn't really get things together, just shock and pain, you know, and they threw me in the car, and I sat there for a few minutes, and before they had put me in the car,

a friend of mine came along. We all worked together. That's the one I say I recognized, Ben. I recognized his voice. And he had gone up to the little store up there. The store's about, I'll say a football field and a half from where the incident took place, and he ran up there and he got some orange juice and he brought it back. They had me in the back of the car, and I asked the officer that was standing back there by the car--the rest of them had went back to the front of the car and they were talking--I asked that officer, "Please give me the orange juice." Her exact words: "I'm not giving you shit." And he went to the store and brought the orange juice back, and they refused to give me the orange juice.

Q. Who refused to give you the orange juice?

A. Officer Matos.

Q. What happened then?

A. They stayed down there for a little bit, and then they started back up the street with me. Well, there was an officer there that I knew. He had took an accident report for me, not an accident report but a breaking and entering.

Q. Which officer was this?

A. His name was Rudy Torrence. He had took a break-in report like somebody breaks into your house and you have to call the police. He came out and took a report for me about a year before that, and when I see him around the store and stuff, I'd always talk to him, you know, because he's a real nice guy. Well, I think he might have had something to do with taking me home, because I don't think they intended to take me home at that point.

MR. AYCOCK: Objection. Move to strike.

THE COURT: Motion allowed as to what he thinks. Go ahead.

Q. Did the police officer take you anywhere at that point?

A. Did they what?

Q. Did the police officers take you anywhere in their car?

A. Yes. After they left the place of the incident, they took me straight home, and on the way home, I was riding in the officer's car that stopped me. There was a call that came in on the radio, and the call stated, said, "This fellow Graham, be careful. He's got a couple of big caliber handguns listed in his name." Mr. Conner answered the radio. He said, "It's not going to bother me because when I take the cuffs off, I'm gone."

Q. Did you still have the handcuffs on?

A. I still had the handcuffs on.

Q. And were you riding in the back of the police car?

A. That's correct.

Q. Did they, in fact, take you home?

A. They took me home.

Q. Then what happened?

A. Well, when they took me home, I still was in the handcuffs, and Mr. Berry and Mr. Alderman, they beat the police there because after the police refused to give

me the orange juice, Ben took the orange juice and they went on to my house because they decided they wanted to take me home. When we pulled up in the driveway, I remember getting out of the car, and when I got out of the car, well, Officer Conner opened the door. I got out of the car, and after I got out of the car, I had one shoe that was off. My left shoe was off. And Mr. Conner and Mr. Berry, they held me up because the handcuffs was still on me, and I couldn't use my hand, and they kind of held - Mr. Alderman kind of held my head back and poured the orange juice in me, and we stood there for a couple of minutes, and then they took the cuffs off of me. Officer Rice and Matos, they followed the officer. They came up also behind Officer Conner, and after they took the handcuffs off, that's when I put my shoe on and they wasn't supporting me anymore. When they were giving me orange juice, there was one on each arm, and when they turned me loose, I fell. The officers got in their cars and backed out quickly and was gone, and I went on - after I realized what had happened, I told Mr. Berry, I said, "They've broke my foot."

MR. AYCOCK: Objection. Move to strike.

THE COURT: What he told the - overruled.

Q. Were you still in your yard at this time?

A. Yes.

Q. And did any police officers remain on the scene or at your house?

A. No. The police officers, after they took the cuffs off, they all left, and I went inside. I got my shoe on, and I hopped inside and called the police station, and I asked

them, I said, "Please send me a car out here that was not here before because I've been wronged." Well, they didn't send no different car. They sent Officer Matos, and Officer Rice back, and by this time I was going out of the house with Mr. Berry because we was on the way to the doctor, and when they came up and when they got out of the car, Officer Matos had her - I don't know what they call it - that long stick they carry - but she had that in her hand, and one of them said, "What's the problem now?" And Mr. Berry, he was getting in the car, and he said, "No problem," and we backed out.

Q. Who was driving?

A. Mr. Berry.

Q. Where did you go?

A. We left there and went to Dr. Alan Resnik's office.

Q. Who is Dr. Resnick?

A. That was my diabetic doctor.

Q. Were you treated by Dr. Resnik that day?

A. Yes. They took a blood sugar count, and my blood sugar count was real low, and they got some orange juice in me, and I was telling him my feet was hurting, and he said, "I can't do anything about your feet," and he sent me over to the hospital.

Q. What hospital did you go to?

A. Mercy Hospital.

Q. Who took you there?

A. Mr. Berry took me.

Q. Did you go to the Emergency Room there?

A. I did. There they x-rayed my feet, and I stayed there for awhile, and then they told me I was wanted on the phone, and it was the doctor's secretary, and she told me, "You have two broken bones in your left feet," and from there they told me to go down to Mecklenburg Orthopedic, and Mr. Berry took me down there and the doctor -

Q. Was this Mecklenburg Orthopedic Associates?

A. That's correct.

Q. Which doctor did you see once you arrived there?

A. Dr. Griffin.

Q. Did Dr. Griffin provide any treatment to you?

A. He did. They fitted me with crutches and stuff around my foot, and he gave me a prescription and told me not to walk on it at all, and we left and I went home.

Q. Did you miss any work after this incident?

A. About five weeks and a half.

Q. Five and a half weeks?

A. Yes, sir.

Q. What happened at the end of five and a half weeks?

A. Well, the doctor released me and told me that I could walk on it, and I went back to work.

Q. At this time, in November of 1984, can you tell us what your salary was?

A. I was earning about \$14,000 and a half a year.

Q. You mean \$14,500 a year?

A. That's correct.

Q. Other than the problem with your foot, did you have any other injuries as a result of this incident?

A. I did. I don't know where it got removed at, but there was a large place over my left eye that the skin was gone. I think the concrete did that because it wasn't cut. It wasn't bruised. All the skin was just off. Both my wrists, the cuffs had cut way down deep in them, almost on the bone on both wrists. The next morning is when I really had problems. The next morning I couldn't take my insulin myself, couldn't take it myself for about two weeks because I couldn't use my right shoulder. I don't know what happened to it, but I know it wasn't like that before it started, but I couldn't draw it back. I could hold it down, but I couldn't raise it up.

Q. How did that keep you from being able to administer insulin yourself?

A. Well, I have to take a shot every day, and I'm right-handed, and that was the arm - I couldn't use it. Just couldn't use it. After being slammed on the hood that day, I didn't realize ringing in my ears right then, but when we was on the way up the street, that's when I realized the ringing in my ear because when that radio came on when he was telling him about the guns that I had, then I realized there was a ringing in my ear, in my right ear. Well, the ringing, it's still there. My shoulder, it was - it got all right after about three or four months. My right hand, both hands were numb. I think the cuffs were too tight. I think they did that. Both hands were numb. I

could rake my hand across the back of them and I had no feeling. The right one, the feeling came back in five or six days. The left one, it was about two and a half months before the feeling came in. Before that, when I raked my hand across the back, it was like raking a pencil across the back of it. I couldn't walk because I have a bone disease, and I was under medication before this happened, and after it happened, they had to increase my medication, and the medication that they gave me was so strong -

MR. AYCOCK: I object to this without medical support.

THE COURT: Object to what, Mr. Aycock?

MR. AYCOCK: Testimony about any pre-existing bone condition, bone disease. I think he needs a doctor to do that.

THE COURT: Sustained. The jury will not consider the testimony. Go ahead, sir.

Q. Mr. Graham, you are not to testify any further about the bone disease. Let me ask you this, Mr. Graham. Before this incident, had you ever had this ringing in your ears that you're describing?

A. No.

Q. Can you tell us what the ringing was like?

A. I can't - I'm - I can't state the sound, but it's kind of a high-pitched sound, and it just rings all the time. It just rings all the time. Don't ever stop. And it's kind of loud. It just don't stop.

Q. Has the ringing diminished at all?

A. No.

Q. Not since the day of this incident?

A. (No answer)

Q. You'll have to answer yes or no.

A. No.

Q. Were you charged for the Emergency Room visit by Mercy Hospital?

A. I was.

Q. What was the amount of that charge?

A. \$75.12.

Q. And did Mecklenburg Orthopedic Associates charge you for their treatment?

A. They did. I made four visits, which came to a total of \$275.

Q. You mentioned some medicine that you had to take. Was this prescription medicine?

A. Yes. Dr. Griffin gave me one prescription the evening that I left his office.

Q. What was the cost of that medicine?

A. About \$10.

Q. Did Dr. Resnik charge you for his treatment?

A. He did.

Q. What was the cost of that treatment?

A. \$35.

Q. Did you receive any other treatment or evaluation following this incident?

A. I went to see a Dr. Goldberg. After the ringing didn't go away, everybody said the ringing would go away, but the ringing didn't go away, so I went to the doctor.

Q. What did Dr. Goldberg charge, if anything?

A. Eighty dollars.

Q. You also testified that you missed about five and a half weeks of work with the Department of Transportation. Is that correct?

A. That is correct.

Q. During that period of time, were you engaged in any other kind of work?

A. I wasn't able to work at all. I could only move around like two hours and a half out of the day.

Q. What did you do the rest of the time?

A. Laid on the couch with my feet propped up.

Q. How long did you have to do that?

A. Well, practically the whole five weeks.

Q. After you were released to return to work, did you notice any further problems with your foot?

A. Yes, I had problems. I have always liked to play sports. I played basketball in high school. I always try to continue that because it keeps you in shape. I ain't quite young no more. We went to play basketball one day and I

jumped, and when I came down - and we had only been playing about five minutes. I said I probably wasn't well, so about another month and a half when I went back, I had the same thing happen, so I stopped playing basketball. It bothers me sometime, but most of the time, it doesn't bother me.

Q. Did you have any kind of employment for pay or any type of work other than the Department of Transportation work at the time of this incident?

A. Well, I worked on cars, like I said, and that's what I was doing that day when I had that insulin reaction.

Q. Was this work as a mechanic?

A. Yes.

Q. Were you employed or did you work for yourself?

A. I worked for myself.

Q. And did you charge people for that kind of work?

A. Well, when somebody brought one, yes, but normally what I'd do is go out and buy a car that looked like it needed repair, and I'd do the body work and rebuild the engine and transmission, paint it and sell it.

Q. Were you able to do that work during the five weeks after the incident?

A. No.

Q. In a normal month, how much profit would you be able to earn from that type of work on automobiles?

A. Four or five hundred dollars.

Q. Mr. Graham, have you seen any of the five police officers involved in this case since the date of that particular incident?

A. Yes.

Q. Which officers have you seen?

A. Ms. Matos, I seen her at -

MR. AYCOCK: I object. May I approach the bench?

BENCH CONFERENCE

MR. CONNETTE: I'm going to withdraw the last question I asked of Mr. Graham.

Q. Do you recognize any of the police officers who were present on November 13 or November 12, 1984, in the courtroom today?

A. I do.

Q. Which officers do you see?

A. Officer Conner, he's the officer that was sitting in the Pilot Service Station yard. Officer Rice, he was holding me on my right when my head was slammed against the hood of the car. Ms. Chandler and Ms. Matos.

THE COURT: Would you point those officers out in the courtroom so we'll know which ones you're talking about?

A. Yes, sir.

THE COURT: Which one in Mr. Conner?

A. Mr. Conner is the one sitting beside Mr. Aycock.

THE COURT: Right beside him?

A. He's sitting right beside him at the table. He's the officer that stopped us. Ms. Chandler is sitting on the far left. She's the one that refused to give me the orange juice. and Ms. Matos next to her; Mr. Rice and Chandler.

THE COURT: Let the record reflect the plaintiff has identified the police officers.

MR. CONNETTE: Those were all the questions I have, Your Honor.

* * * *

*JESSICA SAXE, WITNESS FOR THE PLAINTIFF
IN THIS MATTER, SWORN*

DIRECT EXAMINATION

BY MR. CONNETTE:

Q. Tell us your name and address, please.

A. My name is Jessica Saxe. My address is 2216 Dilworth Road West.

Q. What is your occupation?

A. I'm a family physician.

Q. Can you tell us when you finished medical school?

A. 1977.

Q. Where was that?

A. Tubbs, in Boston.

Q. After that, did you complete an internship?

A. And a residency.

Q. How long have you been a medical doctor?

A. For nine years.

Q. Can you describe your practice for us?

A. I have a general family practice.

Q. Is that here in Charlotte?

A. Yes, it is.

Q. Are you certified by any particular boards?

A. Yeah, board certified in family practice.

Q. In the course of your work, do you ever treat individuals who have diabetes?

A. Frequently.

Q. Are you familiar with diabetes from your training and medical school?

A. Yes, I am.

Q. And are you also familiar with diabetes from treating patients?

A. Yes.

Q. Could you describe for us - I'm going to say in lay terms, simple terms - what diabetes is?

THE COURT: You want to qualify the doctor as an expert in the field of medicine, specializing in family practice?

MR. CONNETTE: I will so tender the witness.

THE COURT: The Court will so find.

Q. Go ahead.

A. Diabetes is a disease in which individuals' bodies are unable to use a particular type of sugar called glucose, which is the body's fuel, to use lay terms, and it has to do with the problem of insulin. In some diabetes, there is inadequate insulin, and in other diabetes, the insulin doesn't work right.

Q. Are there particular types of treatment for diabetes?

A. Yes. There are three categories: mild diabetes, treated with diet; diabetics who have somewhat more severe

diabetes and may be treated with pills; and the more sever diabetics who can't be treated with the first two methods and are treated with insulin injections.

Q. Can you tell us whether or not this is a very common illness or problem?

A. It's quite common.

Q. Do you know whether or not there is any particular impact of diabetes among black people in general?

A. It is more frequent among black people.

Q. Do you know what an insulin reaction is?

A. Yes, I do.

Q. What is that?

A. An insulin reaction is caused by the blood sugar being too low. If you're talking about hypoglycemia or low blood sugar due to insulin reaction, it means the person got insulin relatively too great for their intake or blood sugar level, causing their blood sugar level to drop too low below level and producing symptoms.

Q. When you talk about an insulin dosage being relatively too great, what do you mean?

A. Well, an appropriate insulin dose would be one which lowered a high blood sugar level to some range in a normal blood sugar level. Many things can affect that. A person who is on a standard insulin dose which is usually correct for them, may be wrong on other days due to given factors. That could have to do with their food intake, whether they're healthy or ill, how much exercise they get, a variety of factors like that.

Q. Were you present in the courtroom earlier when Mr. Graham was talking about his activities in response to Mr. Aycock's questions?

A. Yes, I was.

Q. On the morning of November 12, 1984?

A. Uh-huh.

Q. Did you hear in Mr. Graham's testimony any particular factors the might have affected or caused the insulin reaction that he suffered?

A. Yeah.

MR. AYCOCK: Objection. The question assumes the fact he had an insulin reaction.

THE COURT: I'll sustain that. Maybe you can rephrase the question, please, sir. Symptoms that he testified - were you here when he testified as to the symptoms he had?

A. I don't think I heard his testimony about symptoms.

Q. Did you hear any testimony about how he felt?

A. Yes, I heard that.

Q. Can you recount for us what you heard of his testimony about how he felt?

A. I remember he said he wasn't feeling great and he indicated that he wasn't thinking straight.

Q. Did you hear any testimony about how he felt while he was working under the car?

A. Yes. I believe he said he felt dizzy and again didn't feel well.

Q. Do you know whether or not these would be symptoms of an insulin reaction?

A. Yes. There are many symptoms of an insulin reaction, and dizziness and general feeling of being unwell are characteristics.

Q. What would the other symptoms of the onset of an insulin reaction be?

A. The mildest symptoms that someone might feel at the onset might be to feel hungry, have a rapid pulse, feel sweaty, and be tremulous. There is a spectrum for those which can be the milder symptoms, to people who have neurological dysfunction where they're confused, don't think straight, don't walk straight, all the way to seizures and coma.

Q. With those symptoms in mind, did you hear in Mr. Graham's testimony any particular activities or occurrences on the morning of November 12 that might have contributed to an insulin reaction?

A. His description of exercise, which was greater than the exercise he was used to on his usual dose of insulin and usual diet could have triggered an insulin reaction.

Q. Mr. Graham testified that he and some other individuals that morning had had some alcohol to drink. Do you know whether or not that could affect an individual with diabetes?

A. Alcohol has calories in it. If a person eats their normal diet and drinks alcohol in addition, it will usually raise the blood sugar level.

Q. Are you saying it would raise the blood sugar level or lower it?

A. Raise it, if drunk in addition to the usual amount of other intake.

Q. When an individual who has diabetes begins to have an insulin reaction, do you know whether or not the individual can normally tell whether or not a reaction is coming on?

A. Individuals with diabetes usually become fairly accustomed to other symptoms and can tell pretty rapidly.

Q. So would it normally require medical verification to establish that a person did have an insulin reaction?

A. Most insulin reactions are probably treated by individuals themselves and never get verified.

Q. What is the normal treatment for an insulin reaction?

A. For a person who is able to take anything by mouth, what they need to do is take something containing sugar, such as orange juice, orange juice with sugar, cookies.

Q. If the reaction advances further without the individual taking sugar by mouth, what could happen next?

A. If it continues to advance, the person may go into coma. At that point they can no longer be treated at home and must be treated by hospitalization with intravenous glucose.

Q. If the condition is not treated, what can the ultimate result be?

A. Can progress to death.

* * * *

WILLIAM L. BERRY, WITNESS FOR THE
PLAINTIFF, SWORN

DIRECT EXAMINATION

BY MR. CONNETTE:

Q. What is your name and address?

A. William L. Berry, 5712 Long Mill Road.

Q. Are you employed, Mr. Berry?

A. Yeah, by the Department of Transportation.

Q. What do you do with the Department of Transportation?

A. I'm a patch foreman. I take care of maintaining the highways of the City of Charlotte.

Q. Is that the same kind of job DeThorne Graham has?

A. Yes.

Q. Do the two of you normally work together?

A. No. He's got one side of town; I've got the other side.

Q. Can you tell us what you do in your normal work as a patch builder?

A. Well, the material I use is asphalt. I have the - the equipment is a board, couple of shovels, and a few inmates, and what I do, I see a hole in the road, I use - the name of the material I use is tar, what I call tar. It's what's used to hold the asphalt to the road.

Q. And that's what you use to patch the roads with?

A. Yeah.

Q. Were you working today?

A. Yes.

Q. You came here straight from work?

A. Yes.

Q. Do you know DeThorne Graham?

A. Yeah.

Q. About how long have you known him?

A. Well, going on four years, since I went to work for the state, I met him.

Q. That's how you met him?

A. Yes.

Q. Calling your attention to Monday, November 12, 1984, in the early afternoon, were the two of you together then?

A. We was together that morning, and then later on that evening.

Q. That afternoon, did you have the occasion to go to his house?

A. Well, I was on my way for a part-time job interview, and I decided to stop by there and to check on him, and when I stopped by there, he got in the car with me, and we was talking and then he told me to "Let's ride." So we were going back down the highway, so he pointed that way like that, and then he pointed at the store, so I pulled into the parking lot.

Q. Which store was that?

A. Pilot, on West Boulevard.

Q. What happened then?

A. Well, after I pulled in the store and stopped, Mr. Graham hopped out of the store - I mean hopped out of the car - and went into the store. Then he immediately come back out of the store and got back in the car and pointed down West Boulevard.

Q. Did you know at that point what he was pointing toward?

A. Well, yes and no, because, see, like his girlfriend is the only one I knew that stayed down that way, and that's the only one he knew that stayed down that way, so I figured he was going down there.

Q. What did you do after he pointed like that?

A. Well, I just pulled off.

Q. Can you tell us what happened next?

A. Well, on my way going down the highway, I checked my rearview mirror and I seen a police car coming down the road. So I thought maybe he would go around me or something, and then I turned to Mr. Graham and asked him what had he done. He never did say nothing, and then the police car pulled up behind me and put his siren on, and I stopped. Then the officer come up to the car and said, "What's wrong with you friend?" And I said, "Well, I don't know." I said, "He might be having a sugar reaction," and then he looked down in the car and he looked over at Mr. Graham, and he said, "What's wrong with you?" And Mr. Graham didn't say nothing. So the officer told me to stay there until he called to see what

went on at the store. Well, on the way back to the car – on his way back to the car, Mr. Graham hopped out of my car and ran around my car twice, and then sat down on the curb.

Q. What do you mean ran around your car twice?

A. He ran in circles around my car twice, and then sat down.

Q. He sat down on the curb?

A. On the curb in front of my car.

Q. Did you do anything after you saw that?

A. Well, by that time, I was out, and I was talking to Mr. Graham, and an officer walked down beside of my car, and he kneeled down with us, and I was talking to Mr. Graham, and by then about three or four more cars of police came up.

Q. When you say you were talking to him, what were you doing? What were you talking about?

A. I was trying to figure out what was wrong with him, because, see, I was scared because I hadn't never seen nobody with no sugar reaction, even though I have people in my family with it, but I hadn't never seen nobody go into reaction like that, and I did not know what to do.

Q. Had you ever seen Mr. Graham having this type of reaction?

A. No, that was my very first time.

Q. How was he acting while you were talking to him?

A. Well, he was calm.

Q. Was he saying anything?

A. No, he didn't say nothing.

Q. And you say the police officer came around and kneeled down beside him?

A. Yes. He was standing beside him. It was a black officer kneeled down beside him. We was talking to him. The officer hadn't said a word, and then I heard somebody – it was a bunch of people by that time there, bunch of people standing around and everything. Like I said, there was three or four cars of police done pulled up and blocked me in, and I was asking people for candy, sugar, orange juice or whatever, to help him, and then somebody said, "Put the handcuffs on him," and then I got pushed out of the way, knocked out of the way.

Q. Who knocked you out of the way?

A. It was a white officer, and I believe his last name was Wright because he put the first handcuffs on him and rolled him face down on the sidewalk and -

Q. Then what happened?

A. Well, by then Mr. Alderman, I had seen Mr. Alderman coming up the street, and I motioned him to stop and help me to talk to the police, and they were just sort of rough, and when they got him around, got his arms from up under him and got the handcuffs on him, Wright was getting ready to pick him up from the ground, and when he went to pick him up from the ground, he put his hand on Mr. Graham's hair. That's when Mr. Alderman put his hand on Mr. Wright's hand and told him, "No, that's not right," and then they snatched him up off the ground and put him face down on my car.

Q. At that point after they picked him up off the ground, how many officers were holding Mr. Graham?

A. It was just one holding him on my car, and that was Mr. Wright.

Q. Can you tell us what, if anything, happened then?

A. Well, Mr. Graham had sort of come to his senses, and he was asking the officer to please look in his wallet for his identification, and one officer I was standing there talking to was a lady, and she made the statement, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." And then I went to begging again, "Please don't lock him up. Just take him home, please," and there was another officer there. After he seen what was going on, he said, "Please, let me get away from him," but I can't remember his name.

MR. AYCOCK: Objection. Move to strike.

THE COURT: Was it any one of these officers you see in the courtroom?

A. I can't remember faces.

THE COURT: Sustained.

A. And then I went to begging and pleading, and they still hadn't called and found out what had happened at the store, so they picked him up off the car. There was four officers, toted him to the car, the back of the police car, and put him in head first, and then the officer that stopped us, he took him and went around the car and opened the other side of the door and pulled Mr. Graham through while the other three fed him in, and then they

got on the radio and called to see what went on at the store, and then the officer - what's his name - Torrence. I can't think of his name. It was a black officer. He said, "I know where he stay at. Please just take him home," and then I went to begging again. I said, "Please take him home. I'll take care of him." So Mr. Alderman come back with the orange juice. I got him to go to the store to get the orange juice, and on his way back, well, he got back just before they decided to take him home, and he asked him could he give him the orange juice, and they said no, and then they decided to take him home. Mr. Alderman led out first, and then me and then the officer that stopped us, because he's the one that had DeThorne in the car, and then he pulled up in the driveway, and I heard him talking on the radio, and they said something about Mr. Graham having a lot of guns, and he said, "Well, I ain't going to worry about that because as soon as I get the handcuffs off of him, I'm gone." So when they went to get Mr. Graham out of the car, the officer reached down to help him, and Mr. Graham said, "No, let me get out by myself." So he got out. He squeezed back and he got out, and then he was standing up. I had him by the left shoulder. The officer had him by the right shoulder. And Mr. Alderman fed him the juice, and then the officer took the handcuffs off of him, and Mr. Graham fell immediately to the floor - I mean to the ground. I had his left shoe in my hand, and then he went to put his shoe on, and he couldn't get it on because it was hurting. So then he went in the house. He ran in the house - well, not ran but walked in the house - and he called the Charlotte Police Department and he asked for some more officers to come out. That he wanted to make a complaint. And they

sent Mr. Wright and a blond officer back out there. I can't remember her name. And they sent them back out, and they came out and jumped out of the car, and the first thing they had in their hand was the blackjack, and Mr. Wright had his pistol, and I told them, I said, "No, that's all right. That's all right. Please. That's all right. Ain't nothing wrong. Just go ahead on." And then I took him to the doctor. I took him to the doctor, and the doctor asked me what was wrong, what happened, and then I told him the same thing, and he told me to take him over to the Emergency Room. That's the way he found out his feet was broke in several places, and then I returned him to his house.

Q. Taking you back to the scene before the officers placed Mr. Graham in the police car, did you ever see Mr. Graham kick anyone?

A. No, I didn't.

Q. Did you ever leave that scene?

A. No, I didn't.

Q. Did you ever see Mr. Graham on the ground kicking his feet up over his head?

A. No, I didn't.

Q. Did you ever see Mr. Graham kick a car?

A. Kick a car? Nope.

Q. Did you see him kicking anything?

A. Naw. The only thing I seen Mr. Graham do is to throw his hand. He refused to put on the handcuffs.

That's the only thing, he threw his hands up trying to keep them from putting the handcuffs on him.

Q. What happened then?

A. Well, that's when Mr. Wright bumped me out of the way, and he proceeded to put the handcuffs on him.

Q. Now, did you ever see any police officers strike or push or shove Mr. Graham?

A. Well, Mr. Wright had him up against my car and he had the handcuffs by one hand, and he had Mr. Graham by his shirt collar with the other one. And he would pull up on him every time he would say something. He asked the officer to look in his wallet for his identification, and the blond lady pushed his head down saying, "Shut up."

Q. Did you see this officer push his head down?

A. Yes, I did.

Q. Was it a male or female?

A. Female.

Q. Pushed his head down where?

A. On the hood of my car.

Q. Could you tell whether there was any amount of force used in doing that?

A. Well, she jumped on his head. I mean, you know, "Hush." You know - "Shut up. Ain't nobody talking to you. Ain't nobody asked you nothing."

Q. Were you able to see or hear that impact?

A. Well, as far as the impact, I didn't hear no impact, but I did see her push his head down.

Q. Those are all the questions I have. Thank you.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-85-439-P

(Caption omitted in printing)

ORDER

(Filed September 19, 1986)

This is an action by Plaintiff brought under Title 42 U.S.C. § 1983 against the City of Charlotte and the individual police officers for damages for denial of Plaintiff's civil rights as a result of the alleged use of excessive force by the police officers in restraining the Plaintiff on November 12, 1984. The Plaintiff further alleges that the Defendants unlawfully assaulted Plaintiff, unlawfully restrained him, constituting false imprisonment and intentionally inflicted mental and emotional distress on Plaintiff in violation of the common law of North Carolina. The Plaintiff also alleges that the actions of the City of Charlotte in not properly training its officers to identify and respond to medical emergencies violate Section 504 of the Rehabilitation Act of 1973, Title 29 U.S.C. § 794, and North Carolina General Statute § 168-2.

At the close of the Plaintiff's evidence all of the Defendants moved for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.

The Court, of course, in ruling on the Motion must consider the evidence in the light most favorable to the Plaintiff. *Galloway v. U.S.*, 319 U.S. 372 (1943); *McClure v. Price*, 300 F.2d 538 (4th Cir. 1962); *Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 427 F.2d 862 (4th Cir. 1970).

The evidence, when reviewed in the light most favorable to the Plaintiff, is that on November 12, 1984, the Plaintiff, who was a diabetic, had an insulin reaction at approximately 1:55 p.m., while doing mechanical work on an automobile at his shop. He asked his friend William Berry to drive him to a convenience store, the Pilot store, in order for him to obtain some orange juice to counteract his insulin reaction.

When they arrived at the store, where the Defendant officer Connor was parked in his patrol car, the Plaintiff rapidly exited or ran into the store and on seeing a line of four or five persons at the counter, did not want to wait and ran or walked rapidly out of the store and returned to Berry's automobile, and told Berry, to take him to his girlfriend's house or pointed in the direction of his girlfriend's house, where the Plaintiff testified he could obtain the orange juice he needed. As Berry drove out of the convenience store parking lot, he was followed by Officer Connor who stopped him approximately one half mile away. Officer Connor observed the Plaintiff in the passenger seat and told Berry he would have to wait until Officer Connor determined what, if anything, Plaintiff had done in the convenience store.

Plaintiff, suffering from his insulin reaction, then exited Berry's automobile and ran around it twice. Berry then asked Officer Connor to help him catch Plaintiff, and suggested that Officer Connor go one way around the car and that he, Berry, would go the other way. On seeing Berry and Connor coming from opposite directions, Plaintiff sat down on the curb and Officer Connor and Berry knelt down to see what was wrong with Plaintiff. The Plaintiff apparently passed out and the next thing he

remembered was that he was handcuffed and lying face down on the sidewalk and that in addition to Connor there were four other police officers. These police officers had arrived in response to a call for a back up by Officer Connor.

Meanwhile, a crowd had gathered around and Officer Townes testified that it appeared things were getting out of hand.

The Plaintiff testified that the officers picked him up and with his hands cuffed behind his back placed him against and over the hood of Berry's car. The Plaintiff then tried to reach for his wallet in his hip pocket and lifted his head up to tell the officers that he was a diabetic and wanted his wallet to show his diabetic identification. One of the officers, Matos, shoved his head down and told him to shut up that no one had asked him anything. At some point during the incident, Plaintiff was asked if he wanted medical assistance and he declined.

The officers then attempted to place the Plaintiff in Officer Connor's patrol car and the Plaintiff vigorously resisted this effort, by kicking and otherwise attempting to keep from being placed in the car. The evidence was that two officers were pushing from behind and one entered the vehicle from the other side and pulled on the Plaintiff until he was in the car.

Officer Connor then determined that the Plaintiff had not done anything unlawful while in the convenience store, but was advised by his dispatcher that the Plaintiff was the owner of one or more guns.

The Plaintiff was then immediately driven home and his hands were uncuffed. He again was asked if he wanted medical assistance and he declined.

Plaintiff's witness, Berry, testified that he did not see any officer push or strike the Plaintiff, except when his head was pushed down on the hood of his automobile. However, Berry testified that his head made no sound when pushed against the hood.

The Court does not find, considering the evidence in the light most favorable to the Plaintiff, that there was excessive force used by the police officers rising to the level of violation of his constitutional rights.

The factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983 are identified as

- (1) The need for the application for the force.
- (2) The relationship between the need and the amount of the force that was used.
- (3) The extent of the injury inflicted.
- (4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

King v. Blankenship, 636 F.2d 270 (4th Cir. 1980), citing *Johnson v. Glick*, 481 F.2d at 1083.

The Plaintiff's evidence, when considered in the light most favorable to him, shows:

- (1) The Plaintiff was having an insulin reaction and was in such a state of agitation that his witness Berry asked Officer Connor to help him to catch him.
- (2) The amount of force used consisted of handcuffing the Plaintiff which even his own witness, Dr. Meadows, testified was appropriate under the circumstances.
- (3) There was no discernable injury inflicted on the Plaintiff. It is true that the Plaintiff's foot was broken during the scuffle with the police. There is absolutely no evidence that the Defendant police inflicted any injury on the Plaintiff.
- (4) It is quite evident that what force was applied was a good faith effort to maintain or restore order in the face of a potentially explosive situation and was not applied maliciously or sadistically for the very purpose of causing harm.

This Court does not deem every push or shove under the circumstances of this case to rise to the level of a violation of constitutional rights.

It is a far cry from the situation on the line in the face of a potentially hostile crowd, and the peaceful atmosphere of the courtroom. These officers were faced with a man whose initial stop was entirely proper, and whose restraint was entirely proper. They were faced with a gathering crowd. Crowds can often become unruly. The most expedient way to avoid a confrontation was to remove the Plaintiff from the scene.

A suggestion was made that a police supervisor should have been called. This would have entailed another 15 or 20 minutes of police presence with a crowd gathering.

Obviously, since the officers have been found by the Court not to have violated the Plaintiff's constitutional rights, for use of excessive force, there would not be any liability on the part of the City of Charlotte.

The Plaintiff's Complaint contained allegations that the City violated Plaintiff's civil rights by failing to supervise or properly train its police officers to identify and respond to the Plaintiff's medical problem, by failing to supervise or train its police officers to insure that reasonable alternatives to the restraint used on Plaintiff were known and available to officers, that Plaintiff was a qualified handicapped person on November 12, 1984, and that the City or its police officers discriminated against Plaintiff on the basis of his handicap.

The evidence, however, shows, taking Plaintiff's witness Dr. Meadows' testimony, that the Charlotte Police Department's training of its officers met or exceeded the number of hours required by the State.

Further, § 504 of the Rehabilitation Act of 1973, Title 29 U.S.C. § 794, refers to discrimination against a handicapped person by reason of his handicap by exclusion from any program or activity receiving Federal Financial Assistance. The stopping of the Plaintiff under the circumstances of this case and the restraint of the Plaintiff who was having an insulin reaction by no stretch of the imagination would be prohibited by N.C.G.S. § 168-2, § 504 of the Rehabilitation Act of 1973.

NOW, THEREFORE, IT IS ORDERED that all Defendants' Motions for a directed verdict as to all counts of the Plaintiff's Complaint are GRANTED.

This the 17th day of September, 1986.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-C-85-439-P

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[xx] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT PURSUANT TO ORDER dated Sept. 19, 1986 by Judge Robert D. Potter, this case is dismissed.

(At the close of plaintiff's evidence, defendant moves for directed verdict. Court allows motion and case is dismissed as to all counts.)

September 23, 1986

THOMAS J. McGRAW, Clerk

/s/ Agnes E. Alexander
Deputy Clerk

United States Court of Appeals,
Fourth Circuit.

Dethorn GRAHAM, Plaintiff-Appellant.

v.

CITY OF CHARLOTTE; M.S. Connor;
R.B. Townes; T. Rice; Hilda P. Matos;
M.M. Chandler, Defendants-Appellees.

No. 86-2163.

Argued April 6, 1987.

Decided Aug. 25, 1987.

Before RUSSELL and HALL, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

K.K. HALL, Circuit Judge:

Dethorn Graham, the plaintiff in an action alleging the unconstitutional infliction of excessive force by officers of the Charlotte, North Carolina Police Department, appeals an order of the district court, 644 F.Supp. 246, granting a directed verdict in favor of the defendants. Although we find that the conduct of the police officers was far from commendable, we agree that no constitutional injury occurred. We, therefore, affirm.

I.

On November 12, 1984, Graham was working on an automobile at his home in Charlotte, North Carolina, when he felt the onset of a diabetic insulin reaction. For a diabetic such as Graham a reaction caused by a drop in blood sugar can cause nausea, dizziness, and disorientation. Left untreated the reaction can lead to coma or even death.

When Graham noticed his insulin reaction, he asked a friend, William Berry, to drive him to a nearby convenience store. Graham intended to purchase orange juice, knowing that the sugar content would counteract the reaction. When he entered the store, however, Graham saw a number of people ahead of him at the counter. In an apparently agitated state, Graham ran or walked rapidly out of the store and asked Berry to drive him to his girlfriend's house.

During this time, officer M.S. Connor of the Charlotte Police Department had been sitting in his patrol car near the convenience store. Observing Graham's erratic behavior, Connor followed the car being driven by Berry and made an investigative stop approximately one-half mile from the store. As Connor approached the automobile, Berry informed him that Graham was having a "sugar reaction." Connor responded that Berry would have to wait until it was determined what, if anything, Graham had done at the convenience store. Connor then returned to his patrol car to summon backup assistance.

At this point, Graham, in the throes of the insulin reaction, exited Berry's automobile and ran around it twice. At Berry's request, Connor approached to assist Berry in catching and restraining Graham. When Connor and Berry approached, he sat down on the curb. Graham testified that he lost consciousness during that time and that when he awoke he was lying face down on the ground with his hands cuffed behind his back.

At different intervals, four other Charlotte police officers, R.B. Townes, Hilda Matos, M.M. Chandler, and T. Rice, arrived on the scene in response to Connor's

request for backup. A crowd also began to gather from a nearby apartment complex. After the police officers determined that no crime had been committed at the convenience store, they decided to place Graham in a patrol car and transport him home.

Graham testified that he struggled with the officers because they would not allow him to reach his wallet and display a card identifying him as a diabetic. He also maintained that the officers refused to allow one of his friends to give him orange juice and that one of the officers cursed him when he asked for the juice. Graham further maintained that in the struggle, his face was slammed against the hood of the police car before he was then forcibly shoved into the car and driven home.

It is undisputed that at some point during the unfortunate incident Graham's foot was broken. Graham also contended that he suffered an abrasion over his left eye, that his wrists were cut by the handcuffs, that his right shoulder was injured and that he developed a loud ringing in his right ear as a result of being "slammed" onto the hood of the automobile.

Graham subsequently brought a civil action in district court on July 11, 1985, against the City of Charlotte and the five individual police officers present on November 12, 1984. In addition to alleging the infliction of constitutionally excessive force by the officers, Graham charged that the city had failed to train its police officers to respond appropriately to a medical emergency. He also alleged the officers' conduct amounted to discrimination on the basis of handicap in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 704. Finally,

Graham asserted pendent state claims of assault, false imprisonment and intentional infliction of emotional distress under North Carolina common law.

The case came on for trial on September 16-17, 1986. In addition to his own account of the incident, Graham presented the testimony of William Berry and Officer Townes. Graham also sought to introduce expert testimony by Dr. Robert Meadows on the subject of proper police training.¹

Following the presentation of plaintiff's case, all defendants moved for a directed verdict pursuant to Fed.R.Civ.P. 50. Upon consideration of the motions, the district court first concluded that a reasonable jury, viewing the evidence in the light most favorable to plaintiff, could not find that the infliction of force by the police officers was constitutionally excessive. The court also found that Graham's allegation of improper or inadequate police training by the City of Charlotte was refuted by the testimony of his own expert witness. Finally, the court rejected the claim of handicap discrimination based on § 504 of the Rehabilitation Act on the ground that the statute did not reach misconduct of the sort alleged by

1. Dr. Meadows, an experienced instructor in the field of criminal justice, was employed at Appalachian State University at the time of the trial. The court permitted Dr. Meadows to express an opinion regarding the appropriate level of police training. The court declined, however, to allow Meadows to offer an opinion concerning whether the officers acted in conformity with adequate training on November 12, 1984. In this appeal, Graham contends that the court erred in restricting the opinion of his expert.

Graham. Accordingly, the district court granted all motions for a directed verdict as to all counts of the plaintiff's complaint.²

II.

On appeal, Graham contends that the evidence presented was sufficient to raise a jury question as to whether the officers' use of force and refusal to provide medical care were constitutionally unreasonable. Graham further argues that the district court applied an incorrect legal standard when it assessed the evidence in support of his excessive force claim. Finally, Graham maintains that the district court committed reversible error in both the disposition of his state tort claims and the limitation imposed on Dr. Meadows' expert testimony. We see no merit in any of Graham's contentions.

As a threshold matter, we reject any suggestion that the district court erred in setting forth the correct standard for constitutionally excessive force. Citing the factors articulated in our decision in *King v. Blankenship*, 636 F.2d 70 (4th Cir.1980), the district court expressly considered:

- (1) The need for the application for the force,
- (2) The relationship between the need and the amount of the force that was used,

2. The district court's order made no specific reference to the pendent state claims. Graham suggests, however, that a directed verdict on "all counts" implied that a directed verdict was granted in those claims.

- (3) The extent of the injury inflicted, and
- (4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

Graham argues, however, that subsequent decisions of this Court including *Carter v. Rogers*, 805 F.2d 1153 (4th Cir.1986), *Justice v. Dennis*, 793 F.2d 573 (4th Cir.1986), and *Kidd v. O'Neil*, 774 F.2d 1252 (4th Cir.1985), have altered the *King* factors by abandoning consideration of whether the allegedly excessive force was "applied maliciously and sadistically for the very purpose of causing harm." Graham contends that excessive force is now measured on a totality of the circumstances that examines only the need for force, the amount of force used and the extent of any injury inflicted. Appellant's theory, however, is rooted in a substantial misreading of our previous decisions.

In *Kidd*, we rejected a lower court's determination that constitutionally excessive force turned solely upon whether the state actor had intentionally deprived a plaintiff of a specific constitutional right. Instead, we concluded that an excessive force claim required the court to "grapple" with both the degree of force applied and the factual context in which the force arose. *Kidd*, 774 F.2d at 1261. Far from rejecting consideration of the fourth *King* factor, we held that concepts such as "malicious and sadistic" should be understood as descriptions of the degrees of force that exceed the state's privilege,

and, thereby, implicate intrusions into constitutionally protected "personal security." *Id.*³

In *Carter* and more specifically in *Justice*, we have confronted the question of how best to instruct the jury on the issue of excessive force. Our concern has been that the jury should examine all of the relevant circumstances when determining whether the use of force was constitutionally unreasonable and not focus exclusively on any one factor. While that issue has not at this juncture, been conclusively resolved⁴, nothing that we ultimately decide with regard to proper jury instructions is likely to affect the propriety of the district court's balanced application

3. In *Kidd*, we recognized that the right to personal security may, depending upon the factual circumstances, involve rights protected by the fourth, fifth or eighth amendments. In the recent decision by the United States Supreme Court in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the court concluded that an excessive force claim arising under the eighth amendment "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" [Citations omitted] 106 S.Ct. at 1085.

Graham was, of course, not an incarcerated prisoner. His complaint of excessive force did not, therefore, arise under the eighth amendment. It is unreasonable, however, to suggest that a conceptual factor could be central to one type of excessive force claim but reversible error when merely considered by the court in another context.

4. The panel decision in *Justice* was vacated by a grant of *en banc* rehearing, 802 F.2d 1486 (4th Cir.1986). The opinion of the full court has not yet been announced.

of the four *King* factors when ruling on a motion for a directed verdict.

We conclude, therefore, that the district court did not use an erroneous legal standard when deciding whether Graham's case could withstand a motion for a directed verdict. The only question remaining is whether under that standard, a reasonable jury viewing the evidence in the light most favorable to the plaintiff could have found that Graham's constitutional right to personal security was violated by officers of the Charlotte police department, *e.g.*, *Wheatley v. Gladden*, 660 F.2d 1024 (4th Cir.1981). We agree with the district court that appellant's evidence could not support a verdict in his favor.

It is undisputed that on November 12, 1984, Officer Connor observed a man in a state of obvious agitation run into a convenience store, exit almost immediately, enter a car and drive rapidly away. Under those circumstances, reasonable suspicion would justify at least a brief investigative stop of that vehicle. Indeed, appellant has not contended in this appeal that the initial stop of Berry's automobile was improper.

Once the stop had occurred, Graham's illness induced behavior was so erratic that Berry was forced to seek the officer's assistance in restraining him. Graham suggests on appeal that he was sitting calmly when the additional police officers arrived and handcuffed him. Graham's trial testimony, however, was that he had no memory of what transpired between the time the car was stopped and the moment he regained consciousness lying on the ground. Although Berry initially testified that

Graham was calm at that time, he conceded on cross-examination that in a statement to the police on November 26, 1984, he had stated that Graham was "having fits." Officer Townes, the first backup officer on the scene, was called as plaintiff's witness and testified that when he arrived, Graham was lying on the ground and kicking backwards toward Officer Connor. Finally, appellant's own expert witness, Dr. Meadows, opined that under the circumstances it was appropriate to subdue and handcuff him. Clearly Graham's own evidence fails to demonstrate either unnecessary or excessive force at this juncture.

We likewise see nothing in the evidence below to suggest that the bounds of constitutionally impermissible behavior were crossed by the subsequent efforts of the officers to remove Graham from the scene. Townes testified that the crowd that had gathered was becoming unruly. In light of that uncontested testimony, the district court's conclusion that removing Graham was an expedient method of avoiding further confrontations is eminently reasonable.

There is no question from the available record that Graham physically resisted the effort to place him in the police car. Sadly, there is also no question that in the course of that resistance, he sustained a broken foot. Nevertheless, there was no testimony from which a reasonable juror could infer that any officer struck Graham or in any way inflicted that injury. Indeed, the available evidence strongly suggests that the injury was both accidental and self-inflicted.

Graham also alleged that the officers "slammed" his head into the hood of an automobile thereby causing an injury that manifested itself as a continuous ringing in his right ear. Berry, however, testified that while he saw the officers push appellant's head down during the struggle, he heard no impact with the car. Moreover, appellant presented no medical evidence to support his allegation of head injury.

Finally, we agree with the district court that there is no evidence that the officers denied appellant medical treatment. Indeed, the uncontested testimony of Officer Townes was that Graham was twice asked whether he wanted medical assistance. Townes further testified that Graham declined the offer, both at the scene of the stop and at the time he was transported to his home.

Appellant's unfortunate encounter with the Charlotte Police Department on November 12, 1984, was a lamentable occurrence. It is deeply regrettable that a private citizen who had committed no crime was forcibly taken into custody and suffered injury as a result. Nevertheless, the evidence clearly indicates that at each stage of the incident, the actions of the officers were essentially reasonable under the circumstances.

As the district court soundly noted, not every push or shove by a state actor can rise to the level of a violation of constitutional rights. It may be fairly debated whether the officers of the Charlotte Police Department behaved wisely on November 12, 1984. We are convinced, however, that a reasonable jury weighing the evidence presented below in accordance with legal standards in

this Circuit, could not find that the force applied was constitutionally excessive.⁵ We, therefore, agree with the district court's decision to grant a directed verdict in favor of the defendants.

III.

Appellant's remaining contentions need not detain us long. With regard to the pendent state claims, we see no indication that the district court actually addressed them in its order granting a directed verdict. Pendent jurisdiction over state claims in federal court is a matter of judicial discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). In light of the thorough and explicit disposition of all of Graham's federal claims, we conclude that the district court's silence on the pendent claims indicates that those claims were dismissed without prejudice to appellant's right to pursue them in state court. We can see no abuse of discretion in that decision.

We likewise see no merit in Graham's claim that the district court erred in restricting the testimony of his expert witness. The testimony which the district court

5. Our decision should not be read as unqualified approval of the conduct of the Charlotte officers. Indeed, we are profoundly dismayed by evidence of coarse and abusive language employed against appellant during the time he was restrained. This deplorable behavior which reflects little credit on Charlotte Police Department, cannot, however, alter our basic conclusion that no constitutional injury was inflicted.

barred related to whether the officers present on November 14, 1984, acted in accordance with proper training. Even were we to conclude that the district court's action somehow exceeded its broad discretion in determining evidentiary admissibility, there would still be no reason to disturb the decision below. Dr. Meadows' proffered testimony was relevant only to Graham's claim that the City of Charlotte had failed to train its police officers adequately. Graham has not, however, appealed the dismissal of his claim against the City. With regard to the issues remaining on appeal, the limitation of Dr. Meadows' testimony has no significance.

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

BUTZNER, Senior Circuit Judge, dissenting:

I

Affirmance of the district court's grant of a directed verdict rests on the faulty premise that Graham's rights and the conduct of the police are measured by a standard fashioned to implement the eighth amendment's prohibition against cruel and unusual punishment. It was error to require Graham to prove, in the words of *King v. Blankenship*, 636 F.2d 70, 73 (4th Cir.1980), that the police acted "maliciously and sadistically for the very purpose of causing harm." *King* dealt with a convict's claim against his guard for cruel and unusual punishment in violation of the eighth amendment. To establish such a violation, a convict must prove "unnecessary and wanton

infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). But Graham was not a convict. He was not even a pretrial detainee or a person under arrest. He was a free, innocent citizen, a man who had a responsible job with the North Carolina Department of Transportation. Unfortunately, he suffered from diabetes and occasional insulin reactions.

The Supreme Court has never even hinted that a person in Graham's situation should be subjected to the rigorous standards of the eighth amendment in order to recover damages for injuries inflicted by the police. The reason for distinguishing between a convict and a free citizen is clear. The police are not privileged to inflict any punishment on a free citizen. Consequently, there is no justification for absolving the police from liability unless the citizen can prove that their conduct satisfied the test for proving cruel and unusual punishment.

The fourth amendment, made applicable to the states through the fourteenth, provides that "the right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated. . . ." Supreme Court precedent establishes that this amendment—not the eighth—is applicable to the claim of a person who protests police conduct arising out of an investigatory stop. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court held that the authority of police to make an investigatory stop "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 U.S. at 20, 88 S.Ct. at 1879. This involves a dual inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified

the interference in the first place." 392 U.S. at 20, 88 S.Ct. at 1879.

Recently, in rejecting the claim that police are authorized to kill an apparently unarmed, nondangerous fleeing suspect, the Supreme Court reviewed the fundamental principles that govern the interaction of police and citizens. In *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985), the Court reiterated that "[w]henver an officer restrains the freedom of a person to walk away, he has seized that person." The Court then explained: "To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" 471 U.S. at 8, 105 S.Ct. at 1699. In neither *Terry*, *Garner*, nor *Whitley* does the Court suggest that the intrusion on an individual's fourth amendment interests occasioned by an investigative stop is valid unless the individual proves by a preponderance of the evidence that the police acted "maliciously and sadistically for the very purpose of causing harm." Although the police acknowledge that Graham is not a convict, they insist that the rigorous standard of proof unique to a convict's claim arising under the eighth amendment bars Graham's action as a matter of law. Their argument is supported by neither logic nor precedent. Instead, it is refuted by *Terry* and *Garner*. We too have long recognized these basic precepts of fourth amendment jurisprudence. See *Kidd v. O'Neil*, 774 F.2d 1252, 1255 (4th Cir.1985).

II

The police acted reasonably in making an investigative stop. But that is not the end of the fourth amendment inquiry. *Garner* explains: "Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." 471 U.S. at 8, 105 S.Ct. at 1699; see also *Terry*, 392 U.S. at 20, 28-29, 88 S.Ct. at 1879, 1883-84. The conduct of the police after the stop is critical to this inquiry.

Because we are reviewing a directed verdict we must determine whether there is evidence which would permit the jury to reach a verdict in favor of Graham. Our review is governed by the following standard:

In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

9 Wright & Miller, *Federal Practice and Procedure* § 2524 at 543-45; See also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1499, 8 L.Ed.2d 777 (1962).

Properly viewed, the evidence discloses that the officer's investigatory stop revealed that Graham was unarmed, that he presented no danger to the public, and

that no probable cause existed to believe he had committed a crime. Berry promptly told the officer that Graham was suffering from a sugar reaction. After Graham had run around the car twice, Berry and the investigating officer calmed him down as he sat on the curb. Another officer appeared and without inquiry about Graham's condition pushed Berry aside, rolled Graham over, and handcuffed him. A third officer arrived on the scene and opined: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."

When Graham, restrained by handcuffs, asked an officer to look in his wallet for his diabetic decal, the officer told him to "shut up" and slammed his head against Berry's car. Aware that they could place no charges against Graham, four officers threw him into a police car. A friend brought orange juice to the police car where Graham was confined in handcuffs. Graham asked the officer to give him the orange juice, and the officer responded "I'm not giving you shit." The officers took Graham to his home where he collapsed in the yard. Friends gave him orange juice and took him to a doctor.

Graham suffered a head injury that left him with a ringing in his ear and an abrasion on his head. He also suffered injuries to his wrists, an injury to his shoulder, and a broken foot. If his evidence is credited, a jury could find that the police caused the injuries.

The police take the position that Graham proved no actionable harm because Berry, one of Graham's witnesses, did not hear any impact when the police pushed

Graham's head against the car and because Berry's statement to a police investigator differed in some respects from his testimony. The police also emphasize that Graham's expert witness acknowledged that it was appropriate to restrain him. Reliance on these arguments for affirmance violates both the standard for reviewing a directed verdict and Federal Rule of Evidence 607. A party is no longer bound by the statement of his own witness. It was the jury's function—not the court's—to decide which version of Berry's account to believe. Moreover, Graham's expert soundly criticized the manner in which the police conducted themselves. His testimony on which the police rely was made in response to a hypothetical question on cross examination framed most favorably for the police in disregard of much of Graham's evidence. Again, the jury was the proper arbiter of the weight to be accorded the expert's response.

Within minutes after the investigatory stop the police knew they were dealing with a seriously ill man who was innocent of any crime. Whether the scope and conduct of their seizure violated the reasonableness requirement of the fourth amendment clearly presented a question for the jury to determine in accordance with the principles explained in *Terry* and *Garner*.

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 86-2163

(Caption omitted in printing)

APPEAL FROM the United States District Court for the Western District of North Carolina,

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

(Dated: August 25, 1987)

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 86-2163
(Caption omitted in printing)

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Butzner voted to rehear the case. Judges Russell and Hall voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Chief Judge Winter, and Judges Phillips, Murnaghan and Ervin voted to rehear the case in banc; and Judges Russell, Widener, Hall, Sprouse, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Hall.

For the Court,

JOHN M. GREACEN
CLERK

Dated: November 13, 1987

Supreme Court of the United States

No. 87-6571

Dethrone Graham,
Petitioner

v.

M. S. Connor, et al.

ORDER ALLOWING CERTIORARI. Filed October 3,
1988.

The petition herein for a writ of certiorari to the
United States Court of Appeals for the Fourth Circuit is
granted.

October 3, 1988
